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RM 2007 1
COMMENT NO. 5

In the Matter of **Section 109 Report to Congress**	**Docket No. 2007-1**

COMMENTS OF AT&T SERVICES INC.

I. INTRODUCTION

AT&T Services Inc. ("AT&T") hereby submits its comments in response to the Notice of Inquiry ("NOI") issued by the Copyright Office on April 16, 2007.[1] The NOI seeks comment on, among other things, whether the Section 111 statutory license regime should be retained and, if so, whether new types of video services are eligible for the license.

It is unlikely that consumers would enjoy today's diversity of platforms for viewing broadcast television but for the statutory license. By striking a careful balance between the legitimate interests of copyright owners to be compensated for their works and those of distributors to have a practical means of obtaining licenses and paying royalties, the statutory license has enabled programmers and distributors alike to meet growing public demand for varied content and competitive choices. Indeed, in recognition of this unquestioned success, Congress has both renewed and expanded the statutory license several times since its inception in 1976.

In short, the statutory license is as relevant and necessary today as it was when enacted over 30 years ago. The transaction costs and logistical barriers associated with obtaining

[1] *See* Section 109 Report to Congress, 72 Fed. Reg. 19,039 (Lib. Cong. Apr. 16, 2007) ("NOI").

licenses through hundred or even thousands of separate negotiations with the multitude of copyright owners whose programs are shown on broadcast television would be enormous and insurmountable. That was true in 1976 and is true—perhaps even more so—today. In the absence of the statutory license, incumbent distributors would surely have to reconsider their commitment to offering broadcast programming and nascent competition from AT&T, Verizon and others would be squelched. The benefits of the statutory license have been enduring: in its various iterations, it has applied to many distinct technologies, including cable television, MMDS, satellite, and SMATV providers. And, now, the license will support the deployment of a new generation of distribution technologies, including AT&T's U-Verse TV video service. Against this backdrop, maintaining the statutory license is an easy, obvious choice.

II. EXECUTIVE SUMMARY

The Copyright Office issued the NOI to help it respond to a mandate contained in the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA") to examine and compare the statutory licensing systems for cable and satellite television (set forth in Sections 111, 119, and 122 of the Copyright Act of 1976) and recommend to Congress any necessary legislative changes.[2] The NOI seeks comments on a number of important issues, including "whether the [statutory] licenses should be eliminated rather than expanded"[3] and, if retained, "whether new types of video retransmission services, such as IPTV–based services offered by AT&T, may avail themselves of any of the existing statutory licenses."[4]

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[2] *See* NOI, 72 Fed. Reg. at 19,040.

[3] *Id.*, 72 Fed. Reg. at 19,054.

[4] *See id.*

First, there is no question that the statutory copyright license scheme is the best solution to a difficult copyright problem that existed when Congress first imposed copyright liability on cable systems in 1976 and continues to exist today. That problem stems from the high transaction costs, including the nearly insurmountable difficulty of advance licensing, that would result from forcing multichannel video programming distributors to individually license each copyrighted work included in the broadcast signals they retransmit. Indeed, Congress found that "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system."[5] Congress thus enacted the statutory license, which permits "cable systems" to retransmit broadcast signals containing copyrighted works in exchange for complying with the terms of the statutory license and paying royalties. Because the circumstances that required a statutory license in 1976 still exist today, and opponents of the statutory scheme consistently fail to offer a better solution, Congress's continued reliance on statutory licensing is well justified.

Second, it is clear that AT&T's U-Verse TV service is eligible for the statutory license because U-Verse TV fully meets the Section 111(f) definition of "cable system." The Copyright Office has previously found it useful to divide the definition of "cable system" into five elements: the retransmission system must (1) be a facility; (2) that is located in any State, Territory, Trust Territory or Possession; (3) that receives the signals or programs from an FCC licensed broadcast station; (4) and then makes retransmissions of those signals via wires, cables, microwaves, or other communications channels; (5) to subscribing members of the public who

[5] H.R. Rep. No. 94-1476, at 89 (1976).

pay for such service.[6] As explained below, U-Verse TV meets every element of this definition, which is to be construed broadly to allow new technologies into the marketplace.

III. THE STATUTORY LICENSE REMAINS NECESSARY FOR RETRANSMISSION OF BROADCAST SIGNALS BY MVPDS

The enactment of the Section 111 statutory license was the result of a thorough debate over a complex question of federal policy and has proved to be an ideal solution that permits Congress to achieve two important copyright goals.[7] First, because it dramatically reduces transaction costs, the statutory license increases public access to copyrighted works by creating the conditions in which different and improved distribution technologies can meet the public demand for broadcast television.[8] Increasing public access to creative works is a central purpose of copyright law generally,[9] and Congress has specifically found that the public has a strong interest in access to broadcast signals via cable and other technologies.[10] Second, the statutory license ensures that copyright owners who license works for primary transmission are compensated when these works are retransmitted by multichannel video programming

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[6] *See* Notice of Proposed Rulemaking, In re Cable Compulsory License; Definition of Cable Systems, 56 Fed. Reg. 31,580, 31,592 (Lib. Cong. July 11, 1991) ("Compulsory License NPRM").

[7] *See* NOI, 72 Fed. Reg. at 19,040. In these comments, AT&T does not address issues related to satellite licenses.

[8] Barbara Ringer, *Copyright in the 1980s*, 5 BULL. OF THE COPYRIGHT SOCIETY 299, 303 (1976) (explaining that statutory licenses are often used "where technology has made old licensing methods for established rights ponderous or inefficient"); Robert J. Morrison, *Deriver's Licenses: An Argument for Establishing a Statutory License for Derivative Works*, 6 CHI.-KENT J. INTELL. PROP. 87, 95 (2006) ("Existing statutory licenses are designed to remove or reduce the transaction cost to licenses."). In short, "[t]he idea behind a statutory license . . . is to reduce the transaction costs needed to license out the work. Sans statutory license, the potential lessee must determine the current owner, or owners, of a copyright, determine which rights she will need, and then negotiate a fee for the use." *Id.* at 94.

[9] *See, e.g.*, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994) (explaining that "copyright law ultimately serves the purpose of enriching the general public through access to creative works").

[10] *See* NOI, 72 Fed. at 19,049 (explaining that "the FCC, the courts, and Congress, recognized the public benefits inherent in the delivery of distant signals by cable systems").

distributors. That is, by ensuring compensation, the license enhances the economic incentives to create, another key aim of copyright law.[11]

Until Congress enacted the Copyright Act in 1976, American copyright law imposed no obligation on operators of cable systems to obtain licenses and pay royalties for the copyrighted works included in broadcast programs they retransmitted.[12] The challenge Congress faced in imposing copyright liability on secondary transmissions by cable systems was incorporating cable systems into the traditional copyright scheme, which grants authors exclusive rights in their works, including control over both access and price.[13] Cable television, as a "new method[] for the reproduction and dissemination of copyrighted works,"[14] "strain[ed] [] [the traditional] []scheme . . . [by] alter[ing] the *degree* in which the author [could] control access" to her works.[15] That strain arose from developments in cable television technology that enabled cable systems to carry "multiple broadcast signals containing

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11 *See, e.g.*, *Fogerty*, 510 U.S. at 527-28 (explaining that copyright encourages the production of creative works by ensuring a fair return for creative labor).

12 *See* H.R. Rep. No. 94-1476, at 89, 1976 U.S.C.C.A.N. at 5703 (recognizing that the cable television industry had been under no obligation to "pay[] copyright royalties for its retransmission of over-the-air broadcast signals"). Though copyright owners had argued that operators of cable systems were subject to the copyright laws then existing, the Supreme Court concluded, in two landmark opinions, that the retransmission of certain broadcasts was not a "performance" under the existing copyright law and therefore was not an "infringement." *See Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 395-402 (1968); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 405 (1974); NOI, 72 Fed. Reg. at 19,040 ("The years leading up to the enactment of the Copyright Act of 1976 were marked by controversy over the issue of cable television. Through a series of court decisions, cable systems were allowed under the Copyright Act of 1909 to retransmit the signals of broadcast television stations without incurring any copyright liability for the copyrighted programs carried on those signals.").

13 Seltzer, *Exemptions and Fair Use in Copyright* at 50 (Harvard University Press) (1978).

14 H.R. Rep. No. 94-1476, at 47, 1976 U.S.C.C.A.N. at 5660.

15 Seltzer, *supra* note 13, at 50; *see* H.R. Rep. No. 94-1476, at 47, 1976 U.S.C.C.A.N. at 5660 (explaining that "technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works").

programming owned by dozens of copyright owners"[16] without seeking actual or legal[17] access to those programs, combined with the fact that it would be very expensive and "[un]realistic for hundreds of cable operators to negotiate individual licenses with dozens of copyright owners."[18] Congress thus was forced to evaluate whether "ordinary market-place economics [could] any longer be relied upon to reward [authors] properly without undue costs to society."[19]

Congress's answer to that question was a resounding "no."[20] Congress recognized that cable retransmissions simply could not be incorporated into a privately negotiated copyright scheme because of the prohibitive transaction costs associated with full copyright liability for those retransmissions.[21] The "basic retransmission operations [of cable systems] are based on the carriage of copyrighted [works]" embedded in programs carried in primary transmissions by broadcast television.[22] Because broadcast television stations generally do not own the copyrights to works embedded in programs they transmit and generally are not authorized to sublicense those works, operators of cable systems would be forced, under a scheme of full

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16 NOI, 72 Fed. Reg. at 19,045.

17 *See supra* note 12.

18 NOI, 72 Fed. Reg. at 19,045.

19 Seltzer, *supra* note 13, at 52.

20 "[T]he legislative history of the Act clearly discloses that Congress had considered and rejected full copyright liability for cable retransmission." Lawrence Eagel, *The Cable-Copyright Controversy Continues—But Not in the Courts*, 48 BROOK. L. REV. 661, 678 (1982).

21 As the Copyright Office has recognized, "[a]t the time, it was not realistic for hundreds of cable operators to negotiate individual licenses with dozens of copyright owners, so a practical mechanism for clearing rights was needed. As a result, Congress created the Section 111 statutory license for cable systems to retransmit broadcast signals." NOI, 72 Fed. Reg. at 19,045.

22 H.R. Rep. No. 94-1476, at 89, 1976 U.S.C.C.A.N. at 5704.

copyright liability, to identify the existence of a copyright, identify and locate the copyright owner, negotiate the terms and conditions of a license, and pay specified royalties for *each* copyrighted work embedded in *each* qualifying program retransmitted on *each* broadcast channel. "[T]he prospect of thousands of cable systems having to negotiate with thousands of copyright owners over retransmission rights, to all the programming carried in a broadcast day, never mind a broadcast week, or month or year, was correctly perceived as impossible."[23] Worse still, cable systems would have to overcome "the obvious difficulty . . . of obtaining *advance* clearances for all of the copyrighted material contained in a broadcast."[24] That difficulty creates more than a mere transactional cost—it creates a near guaranteed market failure because a cable system "cannot know in advance every copyrighted work that will be on [a primary broadcast signal]."[25] In the light of these inherent difficulties, Congress concluded "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system"[26] and promptly rejected such a scheme.

Instead, Congress enacted a statutory license that required operators of cable systems to pay royalties for the retransmission of broadcast signals based on an established royalty formula.[27]

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23 Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 265 (1985) (testimony of James P. Mooney, President, National Cable Television Association).

24 House Comm. on the Judiciary, 89th Cong., 1st Sess., Supplementary Register's Report on the General Revision of the U.S. Copyright Law at 42 (Comm. Print 1965) (emphasis added) ("Supplementary Register's Report").

25 U.S. Copyright Office, A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals, A Report of the Register of Copyrights at 27 (Aug. 1997), *available at* www.copyright.gov/reports ("Retransmission Report").

26 H.R. Rep. No. 94-1476, at 89, 1976 U.S.C.C.A.N. at 5704.

27 *See* 17 U.S.C. § 111(c) (2000).

Congress chose a time-honored system that allows copyright holders to be compensated for their works, while at the same time ensures that this new technology would be allowed to flourish.[28] In short, the Section 111 statutory license was a sophisticated solution to the "difficult problem of determining the copyright liability of cable television systems."[29] All of the practical and economic imperatives that led to the creation of the license are present and undiluted today. The NOI seeks comment on whether the statutory license has "served its purpose and is no longer necessary" because "the cable industry has grown significantly since 1976, in terms of horizontal ownership as well as subscribership, and generally has the market power to negotiate favorable program carriage agreements."[30] The market power of the cable industry is not, however, a relevant analytical touchstone because there is no evidence that the size or bargaining power of cable systems would resolve the underlying problems that led Congress to enact the statutory license. Even if there was any such evidence, there certainly is nothing to suggest that the increased size of a few incumbent MVPDs would have any impact on the ability of new entrants to the video marketplace, who need broadcast programming to

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2828 In 1976, Congress also expanded the use of the statutory licenses into other areas, including public broadcasting. *See* 17 U.S.C. § 118. Indeed, Congress has recognized the need for a statutory copyright license, in a number of different contexts, for nearly one hundred years. The Copyright Act of 1909 included a statutory license for mechanical sound reproductions that was, "as far as statutory, across-the-board, arrangements are concerned," the first statutory license "in the world." Ringer, *Copyright in the 1980s, supra* note 8, at 304. "The mechanical license was created in response to the fear that exclusive licenses with a company named Aeolian who made player-piano rolls would give them a 'great music monopoly.' Congress did not want a company's vast intellectual property holdings to dictate the artistic direction of the country." Morrison, *supra* note 8, at 97.

29 H.R. Rep. No. 94-1476, at 89, 1976 U.S.C.C.A.N. at 5703. The Register of Copyrights at the time the copyright law was revised explained that the "cable issue, in particular, has been the reef on which the copyright law revision foundered for seven years." Ringer, *Copyright in the 1980s, supra* note 8, at 304; H.R. Rep. No. 94-1476, at 48, 1976 U.S.C.C.A.N. at 5661 ("[I]t was not possible to complete action on copyright revision in the 90th Congress because of the emergence of certain major problems, notably that of cable television.").

30 *Id.* at 19,054.

compete, to surmount the exceedingly high hurdle of seeking—in advance—a separate license for each copyrighted work embedded in each broadcast signal.

The need for the statutory license stems in large part from the "difficulty and expense of clearing the rights to [] program content," which the Copyright Office has recognized as the "special circumstance" that "warranted creation of [the] Section 111 [license]" in 1976.[31] That "special circumstance" still very much exists.[32] "[W]hether [the cable industry is] an 'infant' or 'mature,' 'mom and pop' or a 'multimedia conglomerate' has nothing to do with the universally recognized impossibility of individual negotiations for the rights to retransmit programming directly from the copyright owners. Congress recognized the need for a mechanism to deal with this problem in 1976, and that need has only increased since then."[33] Indeed, since its adoption in 1976, Congress has expanded the use of the statutory license. In 1988, Congress designed a statutory license (the Section 119 license) that allows satellite providers to retransmit "superstation" and "network station" broadcast signals to their subscribers.[34] This statutory license has been renewed several times.[35] Congress also designed a statutory license (the Section 122 license) that allows satellite carriers to retransmit the signal of a television broadcast station into that station's local market.[36] Satellite carriers who qualify

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31 *Id.* at 19,050.

32 *Id.* (seeking comment on whether the original justification for the statutory license "still exist[s]").

33 Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 454-55 (1985) (statement of Stephen R. Effros, President, Cable Telecommunications Association).

34 *See* 17 U.S.C. § 119.

35 *See* Pub. L. No. 103–369, 108 Stat. 3477 (1994); Pub. L. No. 106–113, 113 Stat. 1501 (1999) ("SHVIA"); Pub. L. No. 108–447, 118 Stat. 3394 (2004) ("SHVERA").

36 *See* 17 U.S.C. § 122.

for this license are not required to pay any copyright royalties.[37] As the Copyright Office has explained, "Section 122 is a relatively noncontroversial provision that has served satellite carriers, broadcasters, and consumers well."[38] The Section 122 license reflects the reality that local retransmissions of local signals add no extra burden on copyright owners "because [a retransmitted] signal is already available to the public for free through over–the–air broadcasting"[39] and owners are compensated by the broadcast station.

In addition, in 1994, Congress overturned a Copyright Office determination that denied the statutory license to MMDS providers. As Congress explained, the purpose of this amendment to Section 111 was to "overturn an erroneous interpretation of the definition of 'cable system' by the Copyright Office, an interpretation which denied the license to microwave carriers."[40] Congress further explained that the amendments were necessary to reflect the realities of the marketplace: "It is necessary and appropriate to make several technical changes to the current law to improve its operation and effectiveness. Included in these changes are two amendments to the section 111 cable compulsory license designed to broaden the scope of that license and adapt it to the realities of the current marketplace."[41]

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37 *See id.*

38 NOI, 72 Fed. Reg. at 19,039; *see also id.* ("The [Section 122] license is permanent and its history is relatively non-controversial. In fact, satellite carriers have increasingly relied upon the license in the last seven years to provide local television signals to their subscribers in over 150 markets.").

39 *Id.* at 19,045. For the same reason, in the cable context, "the cable statutory license permits cable systems to retransmit local television signals without a significant royalty obligation." *Id.*

40 H.R. Rep. No. 103-703, at 7 (1994).

41 S. Rep. No. 103-407, at 7 (1994). These amendments suggest that Congress's recognizes the utility of a statutory licenses "in the case of . . . cable television transmissions" Ringer, *Copyright in the 1980s*, *supra* note 8, at 304. Indeed, "[i]t would seem, on the basis of a great deal of experience, that [the statutory] license is as firmly rooted in our copyright law as anything can be." *Id.* Even critics must admit that the statutory license is "a firmly established part of . . . the . . . cable television industr[y]" and

Despite the evident benefits of this regime, the Section 111 statutory license has been the target of ill-advised objections. Consider, for example, what some describe as the "most sympathetic argument[]" against the statutory license, that authors do not control access to their works after they grant a license for its use by a broadcaster.[42] This argument fails to acknowledge that, as discussed above, the local retransmission of broadcast signals imposes no burden on authors' control of access to their works because they have already licensed those works for local distribution.[43] But, more fundamentally, even with respect to the retransmission of distant signals, critics of the statutory license fail to consider that authors would sacrifice just as much control over their works under a completely private licensing system as they do under the statutory licensing system. Because "mass use" makes individually-negotiated licenses "impracticable," if not impossible, authors are faced with a choice "between a . . . [statutory] license administered by the government and some type of blanket license administered by a private collective."[44] As a practical matter, copyright holders would have no more control over *access* to their works in a system of collectivized bargaining than they currently have under the Section 111 statutory license.[45]

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hope merely that "the concept [is] not [] expanded to other areas." Robert Stephen Lee, *An Economic Analysis of Compulsory Licensing in Copyright Law*, 5 W. NEW ENG. L. REV. 203, 226 (1982).

[42] Morrison, *supra* note 8, at 99.

[43] *See* NOI, 72 Fed. Reg. at 19,045 (explaining that retransmitted signals are "already available to the public for free through over–the–air broadcasting"). For this reason, "the cable statutory license permits cable systems to retransmit local television signals without a significant royalty obligation." *Id.*

[44] Fara Daun, *The Content Shop: Toward an Economic Legal Structure for Clearing and Licensing Multimedia Content*, 30 LOY. L.A. L. REV. 215, 265-66 (1996).

[45] Examples of private licensing collectives include the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Incorporated (BMI), which themselves have been the subject of criticism. *See* Stephanie Haun, *Musical Words Performance and the Internet: A Discordance of Old and New Copyright Rules*, 6 RICH. J.L. & TECH. 3, 16-17, 19 (1999) (referring to criticisms of private licensing collectives for, among other things, violations of antitrust laws, employing unfair

Statutory license schemes also "are sometimes criticized for their administrative costs and other regulatory inefficiencies."[46] Critics ignore, however, that most if not all of these administrative costs and organizational "inefficiencies" would exist to the same, if not greater, degree in the collective bargaining institutions that the market would inevitably spawn to solve the transaction costs problem in a strict liability system. More fundamentally, narrow criticism about the manner in which the statutory license is administered fall far short of anything approaching a principled argument for undoing the statutory license and replacing it with an entirely new and unworkable system. Congress's long-studied determination that the statutory license achieved the appropriate balance of important public values should not be so easily undone.

Critics also fail to explain how a system of private negotiations and licensing agreements would solve the fundamental problem "of obtaining *advance* clearances for all of the copyrighted material contained in a broadcast."[47] Even assuming, as proponents of a private system argue, that the market would form private bargaining collectives and that "a cable system [would be able to successfully] negotiate[] with all the major collectives,"[48] it would remain impossible for a cable system to "be assured that it has cleared all rights" necessary to insulate it from liability. For example, "[w]hat if there were an individual copyright owner who was not represented by any collective, and he or she decided to sue when his or her work

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enforcement practices, employing royalty distribution systems that unfairly favors mainstream authors, and for the perception that they "are run by a select few who cater to already successful, or politically powerful writers and publishers within the organization").

46 Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARVARD J.L. & TECH. 1, 5 (2003).

47 Supplementary Register's Report, *supra* note 24, at 42 (emphasis added).

48 *See* Retransmission Report, supra note 25, at 27 (summarizing comments submitted by various parties).

was retransmitted?"[49] Indeed, as the Copyright Office has recognized, there can be no question that this difficulty "represents a real problem that cannot be brushed under the rug, and it behooves the copyright owners to come forward with practical suggestions for solving it."[50] As Congress has explained, "there is no simple answer"[51] to these incredibly complex regulatory issues. Furthermore, there should be a presumption for maintaining the statutory license because it is so "firmly rooted in our copyright law,"[52] it has "become an integral part of the way that broadcast signals are brought to the public . . . [, and] business arrangements and investments have been made in reliance upon the [statutory] license[]."[53] Thus, the standard of proof demanded of those who would abolish the statutory license should be very high.[54] In the end, the consuming public would suffer the most from eliminating the statutory license. The dramatically higher transaction costs associated with traditional copyright liability would inevitably be passed through to consumers.[55] This would not only deter viewers from

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49 *Id.* at 27 (summarizing comments).

50 Supplementary Register's Report, *supra* note 24, at 42.

51 H.R. Rep. No. 94-1476, at 89, 1976 U.S.C.C.A.N. at 5703.

52 Ringer, *Copyright in the 1980s*, supra note 8, at 304.

53 Retransmission Report, *supra* note 25, at iv. Indeed, "[t]o abolish [the statutory license] would dramatically alter the relationships between the parties and the circumstances under which the current system functions." Ralph Oman, *The Compulsory License Redux: Will It Survive in a Changing Marketplace?*, 5 CARDOZO ARTS & ENT. L. REV. 37, 48 (1986).

54 This is especially evident when considered in the light of the effort Congress expended to determine the best solution to the cable-copyright dilemma. "Once the statutory drafts were issued for comment and congressional consideration, an extraordinary process of open compromise and barter began." Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 481 (1976). During extensive hearings the House Judiciary Subcommittee conducted, for example, "nearly 100 witnesses were heard." H.R. Rep. No. 94-1476, at 49 (1976). "This process continued for nearly fifteen years, down to the very day the bill was finally passed by both Houses of Congress." Ringer, *supra*, at 481-82.

55 "To a significant extent the cost of [imposing traditional] copyright liability [on cable operators] will be borne by cable subscribers." Copyright Law Revision: Hearings on H.R. 2223 Before the

accessing copyrighted works by cable television, but would also substantially undermine a key source of pro-consumer competition at the distribution level.[56]

IV. AT&T'S IP-BASED U-VERSE TV IS ELIGIBLE FOR THE STATUTORY LICENSE.

In the NOI, the Copyright Office recognized that recent technological advances have allowed "video programming distribution systems that use Internet Protocol technology ('IPTV') to deliver video content through a closed system available only to subscribers for a monthly fee."[57] The Office specifically referenced the AT&T "U-Verse TV" service, which "currently uses IPTV to provide multichannel video service in competition with incumbent cable operators and satellite carriers."[58] The Office has asked whether "new types of video retransmission services, such as IPTV–based services offered by AT&T, may avail themselves

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Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 503 (1975) (testimony of Rex Bradley, Chairman, National Cable Television Association), in 14 GEORGE S. GROSSMAN OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 503 (2001).

56 *See* H.R. Rep. No. 103-703, at 29 ("The compulsory license mechanism has been essential for the development of the cable and satellite broadcast industry by facilitating the clearance of the thousands of copyrights related to television programming thereby ensuring access to that programming by cable system operators and satellite broadcasters." (statement of Rep. Synar)). Congress has recognized that it is "important to encourage . . . new technologies because they will become real competitors of cable TV in the marketplace. Competition is an important factor in keeping cable TV rates at a reasonable price. The consumer will be the ultimate benefactor of this increase in competition." Satellite Home Viewer Act of 1994, 140 Cong. Rec. 9268-02, at 9270 (statement of Rep. Moorhead); *see also id.* at 9272 ("There is little question that Congress would like to ensure that there is vigorous competition and diversity in the distribution of video programming and the determination of fair market value fees should reflect that intent." (statement of Rep. Synar)); *id.* at 9271 ("The compulsory license mechanism has been critical for the development of the cable and satellite broadcast industry by facilitating the clearance of the thousands of copyrights related to television programming. This clearance process has been essential for providing access to retransmitted programming by cable system operators and satellite broadcasters which in turn is provided to consumers who may otherwise have to forgo a wide range of diverse video programming.").

57 *See* NOI, 72 Fed. Reg. at 19,054.

58 *Id.*

of any of the existing statutory licenses."[59] For the reasons explained below, AT&T's U-Verse TV service fits squarely with the Section 111 definition of a "cable system" and therefore is eligible for the statutory license.[60]

AT&T offers video to subscribers through an enhancement of the broadband capabilities of AT&T's existing communications network. This IP-based service, branded AT&T U-Verse TV, provides a menu of video and interactive functionalities to subscribing customers. The AT&T IP data network involves Fiber-to-the-Node (FTTN) and Fiber-to-the-Premises (FTTP) technologies that employ a switched, two-way architecture designed to send each subscriber only the programming the subscriber chooses to view at a particular time.

The video delivery system has three major architectural components: a super hub office (SHO); multiple video hub offices (VHOs), currently located in 12 designated market areas across AT&T's service territory; and dedicated terrestrial transport facilities and associated equipment. Under this structure, national video content is acquired, processed, encoded and encrypted at the SHO and then distributed via a national, managed IP data network to the VHO. Local broadcast signals are acquired, processed, encoded and encrypted at the VHOs. Transmissions from a VHO to a subscriber's premises are routed through intermediate offices to a local IP serving office. From there, video content and other IP-based services are delivered to subscribers via dedicated facilities. Transmissions from the subscriber premises to a VHO or the SHO travel via the same closed network. When a subscriber sends a request for

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59 *Id.*

60 There are differences between U-Verse TV and the retransmission of broadcast signals over the public Internet. As the Copyright Office noted in the NOI, for example, "Internet video providers do not own any transmission facilities." NOI, 72 Fed. Reg. at 19,039, 19,053. AT&T does not address whether such offerings should be deemed eligible for the statutory license.

a specific channel, the content is delivered to the subscriber through the FTTP/FTTN closed transmission system described above.

As discussed above, section 111(c) of the Copyright Act provides "cable systems" with a statutory copyright license to retransmit broadcast signals.[61] For purposes of the statutory license, a "cable system" is defined as:

a facility located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the FCC, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.[62]

In prior situations involving eligibility for the statutory license, the Copyright Office has found it useful to divide the definition of "cable system" into five discrete elements.[63] The retransmission system must: (1) be a facility; (2) that is located in any State, Territory, Trust

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[61] *See* 17 U.S.C. § 111(c) ("[S]econdary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by the FCC . . . shall be subject to statutory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmissions is permissible under the rules, regulations, or authorizations of the [FCC].").

[62] *Id.* at § 111(f); *see also* H.R. Rep. No. 94-1476, at 88, 1976 U.S.C.C.A.N. at 5702-5703 ("Cable television systems are commercial subscription services that pick up broadcasts of programs originated by others and retransmit them to paying subscribers. A typical system consists of a central antenna which receives and amplifies television signals and a network of cables through which the signals are transmitted to the receiving sets of individual subscribers. In addition to an installation charge, the subscribers pay a monthly charge for the basic service."). Of course, the definition of "cable system" contained in the Copyright Act, which talks about a "facility used to transmit one or more television broadcast stations," is very different from the definition contained in the Communications Act of 1934, as amended, which discusses a facility "designed to provide cable service." *Compare* 17 U.S.C. § 111(f) *with* 47 U.S.C. § 602(7).

[63] *See* Compulsory License NPRM, 56 Fed. Reg. at 31,592.

Territory or Possession; (3) that receives the signals or programs from an FCC licensed broadcast station; (4) and then makes retransmissions of those signals via wires, cables, microwaves, or other communications channels; (5) to subscribing members of the public who pay for such service.[64] As explained below, U-Verse TV fits easily within this definition.

First, AT&T uses "facilities" to retransmit its IP-based video service.[65] As explained above, AT&T uses a SHO and a number of VHOs in its service territory. From the VHOs, the video content is distributed to intermediate offices, then to the subscriber's local central office, and ultimately to subscribers over "wires" and "cables" owned or controlled by AT&T.[66] AT&T thus uses "facilities"—as required by the statute—to deliver its service to paying customers.[67]

Second, and relatedly, AT&T's IP data facilities are "located in any State."[68] Indeed, like other video services eligible for the Section 111 license, AT&T's facilities are terrestrial and closed. The fact that AT&T's systems, like other systems eligible for the statutory license, may cross state lines does not change this result. As one court explained, if "'located in any State' means located entirely within a single state" then "many of the concededly traditional local systems serving communities that cross a state border would lose their cable system status."[69]

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64 *See id.* at 31,592.

65 17 U.S.C. § 111(f).

66 *See* Final Regulation, *In re Cable Compulsory License; Definition of Cable Systems*, 57 Fed. Reg. 3284, 3290 (Lib. Cong. Jan. 29, 1992) ("Compulsory License Final Rule") (describing a "facility" as a place that "(1) receives broadcast signals, and (2) makes secondary transmissions of those signals").

67 *See id.*

68 17 U.S.C. § 111(f).

69 *Nat'l Broad. Co. v. Satellite Broad. Networks, Inc.*, 940 F.2d 1467, 1470 (11th Cir. 1991). Although this decision was later overtaken by subsequent Copyright Office action with respect to DBS eligibility, the Office did not base its ultimate denial of DBS eligibility on the fact that its service crossed state lines. Rather, the Office found that DBS was ineligible because "[w]hile satellite carriers arguably receive signals in one or more states . . . , the secondary transmissions are not likewise made in any state,

Third, AT&T "receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the FCC."[70] This requirement simply means that any primary transmission that AT&T receives and then retransmits must have been made by a broadcast station that is licensed by the FCC (or an appropriate governmental authority of Canada or Mexico).[71] AT&T only carries broadcast stations properly licensed in this fashion.

Fourth, AT&T makes "secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels."[72] The Copyright Office has explained that the statutory license should be afforded to "video delivery systems that employ cable, wire, or other physically closed or shielded transmission paths" to provide service to their subscribers.[73] That is, to the Copyright Office it has always been without question that, whatever a "cable system" is, it is at least "a wired, closed transmission path service that carried broadcast signals."[74] As described above, U-Verse TV consists of a wired, closed transmission path service that carries broadcast signals.[75]

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but rather from geostationary orbit above the earth." Compulsory License Final Rule, 57 Fed. Reg. at 3290.

70. 17 U.S.C. § 111(f).

71 *See id.* at § 111(c)(1).

72 17 U.S.C. § 111(f).

73 Compulsory License NPRM, 56 Fed. Reg. at 31,591.

74 Compulsory License Final Rule, 57 Fed. Reg. at 3294.

75 Even if AT&T did not retransmit its video service via "wires" or "cables"— which it does—it certainly retransmits broadcast signals through "other communications channels." Although the Copyright Office has, in the past, taken the view that "the phrase 'other communications channels' appearing in the statutory definition was not intended to include open transmission path services such as MMDS," this assertion was rebuked by Congress, which criticized the Copyright Office for adopting an "unnecessarily restrictive interpretation . . . of the phrase 'or other communications channels.'" H.R. Rep. No. 103-703, at 17; *see also* S. Rep. No. 103-407, at 7 (recognizing that "as long as cable enjoyed a permanent statutory license to copyrighted programming that competing delivery systems like MMDS (wireless), HSD, and other satellite technologies should also have the benefit of a statutory license to

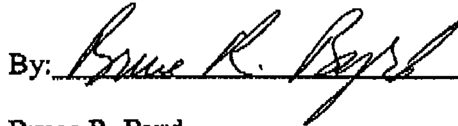
Last, AT&T offers its product "to subscribing members of the public who pay for [the] service."[76] This element of the statutory definition is satisfied so long as the MVPD charges subscribers for the receipt of television broadcast signals.[77] U-Verse TV provides retransmission of broadcast signals to customers who pay for the service. Accordingly, for the reasons outlined above, AT&T's video service meets the Section 111(f) "cable system" definition and therefore is eligible for the Section 111(c) statutory license.

V. CONCLUSION

For reasons discussed above, AT&T respectfully urges the Copyright Office to recommend that Congress maintain the statutory license.

Respectfully submitted,

AT&T Services Inc.

By: 

Bruce R. Byrd
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July 2, 2007

retransmit copyrighted programming"). This "unnecessarily restrictive interpretation" of "other communications channels" prompted the 1994 amendments to Section 111, H.R. Rep. No. 103-703, at 7 (explaining that the 1994 amendments to Section 111 were necessary because of "an erroneous interpretation of the definition of 'cable system' by the Copyright Office, an interpretation which denied the license to microwave carriers"), which were "designed to broaden the scope of th[e] license and adapt it to the realities of the current marketplace," S. Rep. No. 103-407, at 7-8. In any event, the Copyright Office has never doubted that a closed transmission path, such as that utilized by AT&T, would qualify under the "other communications channels" provision. Such an interpretation would render this aspect of the "cable system" definition meaningless. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)(internal citations omitted)).

76 17 U.S.C. § 111(f).

77 *See* Compulsory License Final Rule, 57 Fed. Reg. at 3294 (finding that MMDS providers meet this requirement because they "charge[ ] subscribers for their receipt" of "television broadcast signals").